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**SOH JIUN JEN**

**v.**

**ADVANCE COLOUR LABORATORY SDN BHD & ORS**

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: J-02-468-2006]

C

12 OCTOBER 2009

***COMPANY LAW:*** *Members' rights - Petition under Companies Act 1965, s. 181 - Proposed resolution to remove appellant as director and to withdraw company car and Shell card - Whether appellant's complaint was*

D

*in relation as a member/shareholder - Whether oppressive or unfairly prejudicial to the appellant - Whether court should interfere in internal management of company's affairs*

***COMPANY LAW:*** *Members' rights - Petition under Companies Act 1965, s. 181 - Proposed resolution to set off fees due to directors - Whether*

E

*such exercise singled out appellant alone and prejudiced his right as shareholder - Whether proposal was compulsory to be taken up - Whether oppressive or unfairly prejudicial to appellant*

The appellant, the 2nd and 3rd respondents, were directors and

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shareholders of the 1st respondent company. The appellant was also appointed a sales representative of the 1st respondent and was given among others, a company car and petrol allowance in the form of a Shell card. In or about February 2001, the respondents noticed the appellant's lack of participation or interest in the running of the 1st

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respondent company. The appellant was not keen to agree with any plans for the 1st respondent to expand its business. The respondents later came to know of the appellant's involvement in another company known as Meta Graphic Sdn. Bhd. whose main business was similar to that of the 1st respondent company. The respondents

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also noted that the appellant had not accorded any time and effort in managing the day to day business and operation of the 1st respondent company. In or about March 2001, the 1st respondent cancelled the appellant's Shell card and issued a notice dated 13 March 2001 demanding the return of the company car which the

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appellant duly complied with. The appellant served a notice of

demand dated 2 April 2001 to the 1st respondent demanding RM252,407.35 being director's fees due to him. The 1st respondent failed to pay on the said demand and the appellant served a statutory notice under s. 218 of the Companies Act 1965. Thereafter there were discussions and negotiations between the appellant and the respondents to get the appellant to resign as a director of the 1st respondent. However, the appellant refused to do so. The 2nd and 3rd respondents requisitioned for an EGM of the 1st respondent to pass resolutions to (i) remove the appellant as a director of the 1st respondent; (ii) increase the 1st respondent's authorized capital for its expansion plans; and (iii) set off the director's fees owed by the 1st respondent to each of the directors (comprising the appellant and the 2nd and 3rd respondents) by allotment and issue of 757,200 shares of RM1 each credited as fully paid in the 1st respondent. The appellant being unhappy with the EGM and the proposed resolutions instituted the present proceedings against the respondents for relief under s. 181 of the Companies Act 1965. The petition was dismissed with costs by the learned Judicial Commissioner on 27 February 2006 and the appellant appealed to the Court of Appeal.

**Held (dismissing the appeal unanimously with costs)**
**Per Ramly Ali JCA delivering the judgment of the court:**

**(1)** The appellant's first complaint relating to the proposed resolution at the EGM to remove him as a director of the 1st respondent and the respondents' action to withdraw the company car and the Shell card given to him as a sales representative of the 1st respondent was in relation to his status as a "director" or "sales representative", but not as a member or shareholder of the 1st respondent company. Therefore, the court had no jurisdiction to entertain such proceedings. On this ground alone, the appellant's petition must fail. In any event, the proposed resolution to remove him as director and the respondents' action to withdraw the perks in his capacity as sales representative of the 1st respondent company could not be said to be oppressive or unfairly prejudicial to the appellant based on the facts of this case and the appellant's conduct. *In Re Lundie Brothers Ltd* (foll); *In the Matter of Tahansan Sdn Bhd* (foll). (paras 30, 31, 32 & 36)

**(2)** The resolution to set-off the fees due to all the directors of the 1st respondent company as at 31 May 2000 by allotting new shares of 757,200 to each of them was necessary to preserve the cash flow of the company in view of the plan for expansion. Furthermore, such exercise would collectively affect all three shareholders of the company and would not single out the appellant alone and prejudice his rights as shareholder. There was no element of unfair discrimination against the appellant and no element of disregard of his interest as shareholder of the 1st respondent company. In any event, this proposal could not be said to be oppressive or unfairly prejudicial to the appellant as it was not compulsory to be taken up by the shareholders and was followed by a proviso where if any of shareholders (including the appellant) did not agree to the set-off proposal, then repayment of the director's fees would be made to them subject to terms and condition to be discussed. *In The Matter Of Tong Eng Sdn Bhd* (refd). (paras 37-39)

**(3)** The appellant had failed to prove his claims under s. 181 of the Companies Act 1965. The matters complained of were not matters which affected his right and interest as a shareholder of the 1st respondent company. There was no element of oppression, prejudice or unfair discrimination against him. The learned Judicial Commissioner was right in dismissing the appellant's petition and in holding that the court should not interfere in the internal management of the company's affair as such matters should and could be resolved by the shareholders in general meeting. *Re Kong Thai Sawmill (Miri) Sdn Bhd ; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* (refd); *Foss v. Harbottle* (refd); *Lord v. Copper Mines Co* (refd); *Harben v. Phillips* (refd). (paras 40-44)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu, responden kedua dan responden ketiga adalah pengarah-pengarah syarikat responden pertama. Perayu juga dilantik sebagai wakil jualan responden pertama, dan telah diberikan antara lain sebuah kereta syarikat dan elaun petrol dalam bentuk kad Shell. Pada atau lebih kurang Februari 2001, responden-responden melihat wujud kekurangan minat atau penglibatan perayu dalam perjalanan syarikat responden pertama. Perayu dilihat tidak berminat untuk menyetujui sebarang rancangan untuk responden pertama mengembangkan perniagaannya. Berikutnya, responden-responden

mendapat tahu bahawa perayu ada terlibat dengan sebuah syarikat yang dipanggil Meta Graphic Sdn Bhd yang perniagaannya menyerupai perniagaan responden pertama. Responden-responden juga mendapati bahawa perayu langsung tidak menumpukan masa dan usaha untuk menguruskan operasi dan perniagaan harian syarikat responden pertama. Pada atau lebih kurang bulan Mac 2001, responden pertama telah membatalkan kad Shell perayu dan mengeluarkan notis bertarikh 13 Mac 2001 menuntut dikembalikan kereta syarikat, yang mana telah dipenuhi oleh perayu. Kemudian, pada 2 April 2001, perayu mengeluarkan notis kepada responden pertama menuntut yuran pengarah yang dikatakan terhutang kepadanya sebanyak RM252,407.35. Responden pertama tidak membayar jumlah yang dituntut dan akibatnya perayu telah menyerahkan notis statutori di bawah s. 218 Akta Syarikat 1965. Terdapat beberapa perundingan di antara perayu dan responden-responden supaya perayu meletak jawatan sebagai pengarah responden pertama, namun perayu enggan berbuat demikian. Berikutnya, responden-responden kedua dan ketiga telah memanggil EGM responden pertama untuk meluluskan resolusi: bagi (i) menyingkir perayu sebagai pengarah responden pertama; (ii) menaikkan modal dibenarkan responden pertama selaras dengan pelan pembesarannya; dan (iii) menolak yuran pengarah yang terhutang oleh responden pertama kepada pengarah-pengarahnya (terdiri dari perayu, responden kedua dan responden ketiga) dengan cara mengagihkan kepada mereka 757,200 saham terbitan responden pertama bernilai RM1 setiap satu yang dikreditkan sebagai telah dibayar. Perayu tidak berpuas hati dengan EGM dan resolusi yang dicapai dan dengan itu telah memfailkan prosiding semasa terhadap responden-responden bagi mendapatkan relif di bawah s. 181 Akta Syarikat 1965. Petisyen perayu telah ditolak dengan kos oleh yang arif Pesuruhjaya Kehakiman pada 27 Februari 2006 dan perayu merayu ke Mahkamah Rayuan.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:**

**(1)** Rungutan pertama perayu berkaitan resolusi yang dicadangkan di EGM untuk menyingkirkannya sebagai pengarah responden pertama dan tindakan responden-responden untuk mengambil kembali kereta syarikat dan kad Shell yang diberi kepadanya sebagai wakil penjual responden pertama, adalah dalam hubungan kedudukannya sebagai "pengarah" atau "wakil penjual", dan bukannya sebagai seorang ahli atau pemegang

saham syarikat responden pertama. Oleh itu, mahkamah adalah tidak berbidangkuasa untuk melayani prosiding. Atas alasan ini sahaja, petisyen perayu sudah seharusnya gagal. Walau apapun, resolusi yang dicadangkan untuk menyingkirkannya sebagai pengarah dan tindakan responden-responden untuk menarik balik faedah-faedah sampingan dalam kapasitinya sebagai wakil jualan syarikat responden pertama tidak boleh dikatakan sebagai perbuatan menindas perayu atau yang memprejudis perayu dengan secara tidak adil berdasarkan fakta kes ini dan perilaku perayu. In *Re Lundie Brothers Ltd* (diikuti); *In the Matter of Tahansan Sdn Bhd* (diikuti).

**(2)** Resolusi untuk membuat tolakan yuran yang tertunggak kepada kesemua pengarah responden pertama setakat 31 Mei 2000 dengan cara mengagihkan 757,200 saham-saham baru kepada setiap mereka adalah perlu bagi mengekalkan kecairan tunai syarikat mengambilkira pelan pembesarannya. Selain itu, pelaksanaannya mengaitkan ketiga-tiga pemegang saham syarikat dan bukan cuma mengasingkan perayu sekaligus menjejaskan haknya sebagai pemegang saham. Maka tidak terdapat elemen diskriminasi tidak adil terhadap perayu dan tidak terdapat elemen ketidak-pedulian kepentingan beliau selaku seorang pemegang saham syarikat responden pertama. Walau apapun, cadangan ini tidak boleh dikatakan sebagai menindas atau memprejudiskan perayu dengan secara tidak adil kerana ianya tidak wajib diterima oleh pemegang-pemegang saham, dan diikuti oleh proviso bahawa jika mana-mana pemegang saham (termasuk perayu) tidak bersetuju dengan cadangan penolakan tersebut, maka pembayaran yuran pengarah akan dibuat kepada mereka tertakluk kepada terma dan syarat yang akan dibincangkan. *Re Tong Eng Sdn. Bhd. (Loh Loon Keng, Petitioner)* (dirujuk).

**(3)** Perayu gagal membuktikan tuntutannya di bawah s. 181 Akta Syarikat 1965. Perkara-perkara yang disungutkan bukanlah perkara-perkara yang menjejaskan hak-hak dan kepentingannya selaku pemegang saham syarikat responden pertama. Tidak terdapat elemen penindasan, prejudis atau diskriminasi tidak adil terhadapnya. Yang arif Pesuruhjaya Kehakiman betul bilamana menolak petisyen perayu dan dalam memutuskan bahawa mahkamah tidak seharusnya campurtangan di dalam hal-hal berkaitan pengurusan dalaman syarikat kerana hal-hal tersebut

sepatutnya dan boleh diselesaikan oleh pemegang-pemegang saham di mesyuarat agong. *Re Kong Thai Sawmill (Miri) Sdn Bhd* (dirujuk); *Foss v. Harbottle* (dirujuk); *Lord v. Copper Mines Co* (dirujuk); *Harben v. Phillips* (dirujuk).

**Case(s) referred to:**

*Foss v. Harbottle [1843] 2 Have 461* ***(refd)***
*Harben v. Phillips [1883] 23 Ch D 14* ***(refd)***
*In Re Lundie Brothers Ltd [1965] 1 WLR 1051* ***(foll)***
*In Re Westbourne Galleries [1973] AC 360* ***(refd)***
*In the Matter of Tahansan Sdn Bhd [1984] 1 LNS 1 HC* ***(foll)***
*In The Matter Of Tong Eng Sdn Bhd [1994] 2 CLJ 775 HC* ***(refd)***
*Lord v. Copper Mines Co [1848] 2 Ph 740* ***(refd)***
*Niord Pty Ltd v. Adelide Petroleum NL [1990] 8 ACLC 684* ***(refd)***
*Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC* ***(refd)***
*Re Bellador Silk Ltd [1965] 1 All ER 667* ***(refd)***
*Re Kong Thai Sawmill (Miri) Sdn Bhd ; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC* ***(refd)***
*Re M Dalley & Co Pty Ltd [1968] 1 ACLR 489* ***(refd)***
*Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC* ***(refd)***
*Verghese Mathai v. Telok Plantations Sdn Bhd & Ors [1988] 1 LNS 80 HC* ***(refd)***

**Legislations referred to:**

Companies Act 1965, ss. 16(6), 131(5), 132(2), 158, 181(1)(a), (2), 218

*For the appellant - Dr Clarence Edwin (R Paramanandan with him); M/s Clarence Edwin Low Offices*
*For the respondents - Chin Yew Chong (Woon Wee Yuen with him); M/s Woon Wee Yuen & Partners*

*Reported by Susheila Sreedharan*

## JUDGMENT

**Ramly Ali JCA:**

**[1]** The appellant filed a petition under s. 181 of the Companies Act 1965 against the respondents alleging that the affairs of the 1st respondent company are being conducted or the powers of the directors are being exercised in a manner oppressing to himself; or that some act of the 1st respondent company has been done or that some resolution has been passed which unfairly discriminates against or is otherwise prejudicial to himself.

**[2]** After full trial where witnesses were cross-examined on their respective affidavits, the learned Judicial Commissioner dismissed the petition with costs. Hence the present appeal before this court.

## Relevant Facts

**[3]** The appellant, the 2nd and 3rd respondents, were at all material times, directors and shareholders of the 1st respondent company, Advance Colour Laboratory Sdn. Bhd. The appellant and the 3rd respondent held 100,001 shares each whilst the 2nd respondent held 100,002 shares.

**[4]** Besides being a director, the appellant was also appointed a sales representative of the 1st respondent. In that capacity, the appellant was given perks such as salary of RM3,000 month and allowance of RM1,000 month, a Toyota Camry car and petrol allowance in the form of a Shell card. As a sale representative for the 1st respondent company, the appellant has been managing the 1st respondent company from 1990 until April 2001.

**[5]** Dissatisfaction arose among the respondents when in or about February 2001, the respondents noticed the appellant's lack of participation or interest in the running of the 1st respondent company. The appellant was not keen to agree with any plans for the 1st respondent company to expand its business. The 2nd and 3rd respondents' suggestions to purchase office equipment and digital photo processing machine were rejected by the appellant. Later, the respondents come to know of the appellant's involvement in another company known as Meta Graphic Sdn. Bhd. whose main business was similar to that of the 1st respondent company. The respondents had also noted that the appellant has not accorded any time and effort in managing the day to day business and operation of the 1st respondent company.

**[6]** The respondents aver that the appellant as a director of the 1st respondent has failed to disclose his involvement in Meta Graphic Sdn. Bhd. and has placed himself in a position of conflict of interest; thus breaching his fiduciary duties, management duties and responsibilities as a director owed to the 1st respondent company.

**[7]** In or about March 2001, the 1st respondent cancelled the appellant's Shell card and issued a notice (dated 13 March 2001) to demand the return of the company car given to the appellant. The appellant then returned the said car and the Shell card to the 1st respondent on 16 March 2001.

**[8]** The appellant alleges *inter alia* that the respondents' demand for the return of the company car and petrol allowance (in the form of a Shell card) had in effect forced him to resign as sales representative of the 1st respondent company.

**[9]** It is not seriously disputed that at the relevant time a sum of RM252,407.35 (as the director's fees) was due and not paid by the 1st respondent to the appellant. The same amount was also due and not paid to the 2nd and 3rd respondents as their respective director's fees. The appellant served a notice of demand dated 2 April 2001 to the 1st respondent demanding the said amount due to him. The 1st respondent failed to pay on the said demand. This prompted the appellant to serve a statutory notice under s. 218 of the Companies Act 1965.

**[10]** Thereafter there were discussions and negotiations between the appellant and the respondents to resolve the issue with the view of getting the appellant to resign as a director of the 1st respondent. However, the appellant refused to do so.

**[11]** Following the s. 218 notice, the 2nd and 3rd respondents requisitioned for an EGM of the 1st respondent for the purpose of passing the following resolutions:

(a) to remove the appellant as a director of the 1st respondent;

(b) to increase the 1st respondent's authorized capital for its' expansion plans; and

(c) to set off the director's fees owed by the 1st respondent to each of the directors (comprising the appellant and the 2nd and 3rd respondents) by allotment and issue of 757,200 shares of RM1 each credited as fully paid in the 1st respondent.

**[12]** The appellant was unhappy with the EGM called and the resolutions proposed on the ground that it was oppressive to him and hence instituted the present proceedings against the respondents for relief under s. 181 of the Companies Act 1965. The

petition proceeded for full trial before the learned Judicial Commissioner. The petition was dismissed with costs by the learned Judicial Commissioner on 27 February 2006 upon considering all the facts, evidence and submissions by the parties.

## Findings Of The Learned Judicial Commissioner

**[13]** After full trial of the petition, the learned Judicial Commissioner came to the following findings:

(a) that the resolution to remove the appellant as director was neither oppressive nor unfairly prejudicial to the appellant;

(b) that the management of the 1st respondent company had not acted unfairly or in an oppressive manner or in a manner prejudicial to the appellant as the perks were taken away from the appellant as he had failed to accord time or effort in the management and administration of the 1st respondent company coupled with his failure in carrying out his fiduciary duties and responsibilities as director of the company;

(c) that the resolution sought to be passed by the 2nd and 3rd respondents to set off the directors' fees by issuance of shares in the 1st respondent company would collectively bind all shareholders and would not unfairly discriminate or prejudice the appellant alone in his capacity as shareholder more than other shareholders. Therefore, there was no oppression within the meaning of s. 181 of the Companies Act 1965.

**[14]** The learned Judicial Commissioner also held that the appellant had failed to show that he was unfairly discriminated against or prejudiced as a shareholder or member of the 1st respondent company, and therefore cannot seek reliefs under s. 181(2) of the Companies Act 1965.

**[15]** The learned Judicial Commissioner also held that the court should not interfere with the internal affairs and management of a company as such matters should and could be resolved by the shareholders in general meetings.

## The Law

**[16]** The basis of the appellant's petition lies in the wordings of s. 181 or the Companies Act 1965 which provides:

181(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

**[17]** The protection accorded under s. 181 is only given to the following persons, namely:

(a) Member or shareholder of a company;

(b) holder of a debenture of a company; and

(c) in the case of a declared company under Part IX, the Minister (charged with responsibility for companies).

Other than those persons stated above, no other persons can claim any protection or relief under s. 181, not even a director, executive or employee of a company.

**[18]** If the petition or application is made by a member or shareholder of a company, the petitioner must be able to satisfy the court that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or shareholders (including himself) or in disregard of his interest as member or shareholder of the company.

**[19]** Alternatively, the petitioner must be able to satisfy the court that some act of the company has been done threatened or that some resolution of the members or shareholders has been passed or is proposed which unfairly discriminates against or otherwise prejudicial to one or more of the members or shareholders (including himself).

A **[20]** If the petitioner relies on subsection (1)(a) of s. 181, there must be shown the element of "oppression" or "disregard". It must involve, at least, an element of lack of probity or fair dealing to a member against his right as member or shareholder. Oppression or disregard of interest on a director of a company clearly does not
B come under the ambit of s. 181.

**[21]** Generally, the words "member" and "shareholder" have been used interchangeably. In this respect, Plowman J in dealing with the same issue in the case of *In Re Lundie Brothers Ltd* [1965] 1
C WLR 1051 had said: "As a member of the company, means of course as shareholder of the company".

**[22]** In the Companies Act 1965, both the words "member" and "shareholder" are being used in their respective contexts. There is no specific definition for the two words provided in the definition
D section of the Act. However, s. 16(6) of the Act provides:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its
E register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

**[23]** Generally, there are two types of companies incorporated under the Companies Act 1965, namely, company limited by
F guarantee; and company limited by shares (or company having a share capital). For company limited by guarantee no share is issued. Thus there is no shareholder involved. The members of this type of company are known as "members", not "shareholders". For company limited by shares or company having share capital, the members are
G shareholders of the company and their particulars are kept in the register of members pursuant to s. 158 of the Act.

In short, under the Companies Act 1965 the word "members" conveys a wider scope to include shareholders (for company with
H share capital) as well as members (for company limited by guarantee). In other words, all shareholders of a company are members but not all members are shareholders of the company.

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**[24]** The above classification goes to show that for the purpose of s. 181 of the Act, other than debenture holder and the Minister, which is not the case in the present appeal, only member or shareholder of a company can initiate petition under the section.

**[25]** Lord Cross in *In Re Westbourne Galleries* [1973] AC 360 had once expressed that: "to give the court jurisdiction under this section [210] the petitioner must show both that the conduct of the majority is "oppressive" and that it effects him in his capacity as a shareholder".

**[26]** In *Owen Sim Liang Khui v. Piasau Jaya Sdn. Bhd. & Anor* [1996] 4 CLJ 716 the Federal Court ruled the following:

> The category of persons within a company who may present a petition under section 181 of the Act would be, as a general rule, only one who comes within the terms of section 16(6). This would mean that a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition.
>
> Put another way, in general, a Petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the Court by the section. …

**[27]** In *Niord Pty. Ltd. v. Adelide Petroleum NL* [1990] 8 ACLC 684, the Court in Australia held that an applicant must be registered as a member before he could complain of oppressive conduct and that a mere equitable interest as an unregistered transferee was not sufficient.

**[28]** In *Re M. Dalley & Co. Pty. Ltd* [1968] 1 ACLR 489, the question of standing was raised and the court ruled that the onus of proving that the petitioner was qualified under the then Australian equivalent of s. 181 was on the petitioner. Lush J, in that case, further held that "membership for that purpose could not be established unless it was shown that at the date of the petition, the petitioner was registered in the register as the holder of shares.

**[29]** The s. 181 remedy is a creature of statute and basically, unless the applicant comes squarely within the section, the court ought not to entertain the action. This position has been succinctly stated by Siti Norma Yaacob J, in *Verghese Mathai v. Telok Plantations Sdn. Bhd. & Ors.* [1988] 1 LNS 80 as follows:

A As the Petitioner's *locus standi* is regulated by statute, he must comply strictly with the mandatory provisions of section 181 …

**[30]** In the present case, the appellant's first complaint relates to the proposed resolution at the EGM to remove him as a director of the 1st respondent and the respondents' action to withdraw the company car and the Shell card given to him as a sales representative of the 1st respondent. This complaint clearly is in relation to the status of the appellant as a "director" or "sales representative", but not as a member or shareholder of the 1st respondent company. Therefore, the court has no jurisdiction to entertain such proceedings. On this ground alone, the appellant's petition must fail.

**[31]** The same principle was applied by Plowman J in the case of *In Re Lundie Brothers Ltd (supra)* where His Lordship held:

> ... His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.

**[32]** The same principle was also followed by Chan J in *In the Matter of Tahansan Sdn Bhd* [1984] 1 LNS 1 where it was held:

> The fact that the petitioner in the present case was ousted as a director and that he was deprived of his directors' remuneration relates only to his status as a director, and not to his status as a shareholder. The Court, therefore, is not given jurisdiction in a situation like this to make an order under section 181.

**[33]** From the sequence of events as presented in evidence during trial, there is a clear indication that the actual purpose for the appellant to present the petition under s. 181 of the Companies Act 1965 was to exert pressure on the 1st respondent company to pay him the director's fees of RM252,407.35. In fact the appellant has gone to the extent of issuing a statutory notice under s. 218 of the Companies Act 1965, with a view to wind up the 1st respondent company.

**[34]** Section 181 does not provide any assistance to the appellant to exert pressure on the 1st respondent company to pay him the director's fees. Section 181 is not meant to be used as 'debt

collection facility' by a director against the company. If at all the said amount is due to the appellant as director's fees, the appellant may file a civil claim against the 1st respondent, but surely not by way of a petition under s. 181.

**[35]** There are authorities for saying that even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a *prima facie* case for relief under s. 181, it will be refused if the real purpose of the petition is to obtain payment of money allegedly owed by the company. (See: *Re Bellador Silk Ltd* [1965] 1 All ER 667; and *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110).

**[36]** The proposed resolution at the EGM to remove the appellant as director of the 1st respondent and the respondents' action to withdraw all the perks (with company car and the Shell card) from the appellant in his capacity as sales representative of the 1st respondent company cannot be said to be oppressive or unfairly prejudicial to the appellant. The decision to remove the appellant as director of the 1st respondent company was rightly made based on the following grounds:

(a) that the appellant became a director of another company known as Meta Graphics Sdn. Bhd., a company with its main business similar to that of the 1st respondent company;

(b) that the appellant had put himself in the position of conflict of interest within the meaning of s. 132(2) of the Companies Act 1965. The appellant's failure to declare his directorship in Meta Graphics Sdn. Bhd. which was in direct conflict with his duties owed to the 1st respondent company is in contravention of s. 131(5) of the Companies Act, 1965;

(c) that the appellant had, since the month of March 2001, not accorded time and effort in managing the day to day business and operation of the 1st respondent company;

(d) that the appellant had not been performing his fiduciary and management duties and responsibilities as director of the 1st respondent company since the month of March 2001 and had refused to co-operate in the management of the company;

(e) the appellant's repeated refusal to agree with any plan to increase the capital of the 1st respondent company; to modernize the 1st respondent company, for instance, the need to upgrade its equipment to digital format and to make it more competitive; and

(f) from the overall conduct of the appellant, one may reasonably infer that he was not interested in taking care of the interest of the 1st respondent company.

**[37]** Based on the evidence available, the resolution to increase the 1st respondent company's authorised capital from RM350,000 to RM5,000,000 was necessary to obtain financing for its expansion plan. The resolution to set-off the fees due to all the directors of the 1st respondent company as at 31 May 2000 by allotting new shares of 757,200 to each of them was necessary to preserve the cash flow of the company in view of the plan for expansion. Furthermore, such exercise would collectively affect all three shareholders of the company and would not single out the appellant alone and prejudice his rights as shareholder. There is no element of unfair discrimination against the appellant. There is also no element of disregard of his interest as shareholder of the 1st respondent company.

**[38]** There is nothing to show that the appellant is affected apart from and over and above the other two shareholders (the 2nd and 3rd respondents) so as to enable him to seek any relief under s. 181 of the Act. (see: *In The Matter Of Tong Eng Sdn Bhd* [1994] 2 CLJ 775, at p. 778).

**[39]** In any event, the proposal to set-off the amount due as director's fees by the allotment and issue of 757,200 shares of RM1 each credit as fully paid in the 1st respondent company is not compulsory to be taken up by the shareholders (including the appellant). The said proposal is followed by a proviso "or failing which, repayment of the same subject to terms and conditions to be discussed." In other words, if any of shareholders (including the appellant) do not agree to the set-off proposal, then repayment of the director's fees will be made to them subject to terms and condition to be discussed. That being the case, such proposed resolution cannot be said to be oppressive or unfairly prejudicial to the appellant as he claimed.

## Conclusion

**[40]** The appellant's complaints comprise mainly matters within the internal management of a company incorporated under the Companies Act 1965. Granting and withdrawal of perks to directors, company executives or employees are purely regulated within the company itself. Issuance of shares within a company as well as appointment and removal of directors are also matters to be decided and implemented by the company itself according to its memorandum and articles of association (M & A), either by the board of directors or the shareholders in general meeting. There are sufficient guidelines and rules to follow as provided in the M & A itself as well as in the relevant provisions of the Companies Act 1965 and the Companies Regulations. In making these decisions, generally, the majority rules. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interest, that s. 181 can be invoked. Persons who join a company (as shareholder) must learn to accept majority rule.

**[41]** As precisely explained by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 (Privy Council):

> The mere fact that one or more of those managing the company possess a majority of the voting powers and, in reliance upon that power, make policy or executive decisions which the complainant does not agree is not enough. Those who take interest in companies limited by shares have to accept majority rule.

**[42]** The rule in *Foss v. Harbottle* [1843] 2 Have 461 has laid down a well known principle which has resulted from the refusal of the court to interfere in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company affairs by the majority or by the board of directors. The court, under the pretext of minority protection under s. 181, should be slow from interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. It cannot be the function of the court to take management decisions and to substitute its opinions for those of the directors and the majority of the members. If the thing complained of is a thing which in substance the majority of the company are entitled to do in accordance with the relevant rules, and regulations then it is only prudent that a meeting of the members be called and

A ultimately let the majority get their wishes. The justification for the rule is the need to preserve the right of the majority to decide how the company's affairs shall be conducted (see: *Lord v. Copper Mines Co* [1848] 2 Ph. 740 at 751 and *Harben v. Phillips* [1883] 23 Ch D 14 at 39 – per Cotton LJ).

B

The provisions of s. 181 of the Companies Act 1965 should not be stretched too far so as to allow minority or individuals to abuse them just because they do not agree or are dissatisfied with the action taken by the majority or the board of directors. Otherwise, company's operation will collapse.

C

**[43]** Based on the above considerations, the court is satisfied that the appellant has failed to prove his claims under s. 181 of the Companies Act 1965. The matters complained of are not matters which affect his right and interest as a shareholder of the 1st respondent company. There is no element of oppression, prejudice or unfair discrimination against him. The learned Judicial Commissioner was right in dismissing the appellant's petition and in holding that the court should not interfere in the internal management of the company's affair as such matters should and could be resolved by the shareholders in general meeting.

D

E

**[44]** Therefore, the appeal is unanimously dismissed with costs of RM5,000 to be paid by the appellant to the respondents. Deposit to the respondents on account of fixed costs.

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